

No. 86-1788

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Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

**TELEGRAPH SAVINGS & LOAN ASSOCIATION, ET AL.,
PETITIONERS**

v.

**FEDERAL SAVINGS AND LOAN INSURANCE
CORPORATION, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

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QUESTIONS PRESENTED

1. Whether the district court properly denied a request for attorneys fees and expenses by non-prevailing parties.

2. Whether the Federal Home Loan Bank Board correctly interpreted its regulations as not requiring 15 days' notice before the transfer of certain of the assets and liabilities of an insolvent federally-insured savings and loan association to another savings and loan association in a "purchase and assumption" transaction.

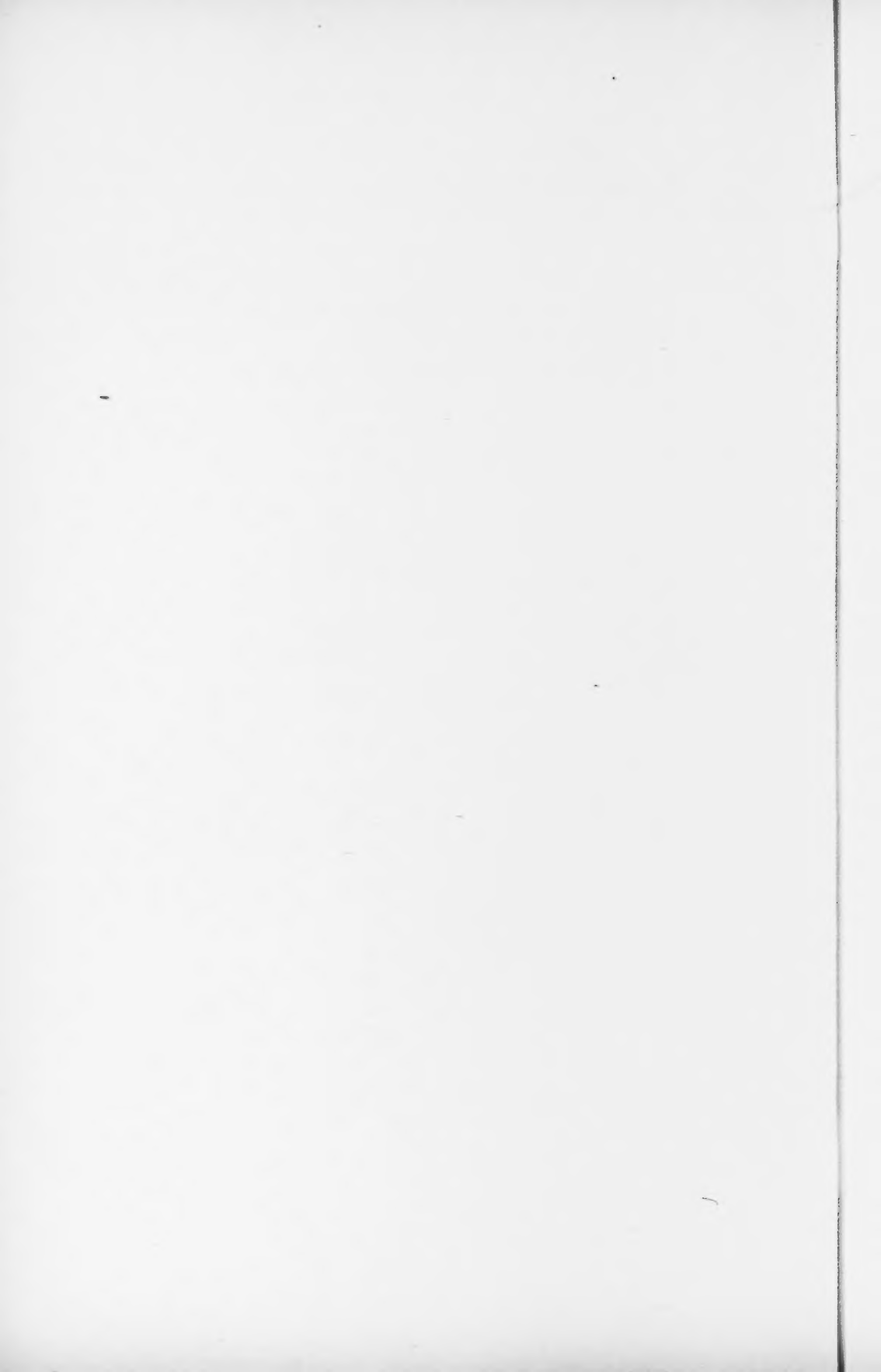


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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 807 F.2d 590. The opinions of the district court granting respondents' motion for summary judgment as to Count VII of the complaint (Pet. App. 10a) and denying petitioners' request for interim attorneys fees and expenses (Pet. App. 11a-16a) are unreported.¹

¹ The petition seeks review of the court of appeals' decision that affirmed the district court's rulings granting summary judgment for respondents as to Count VII of petitioners' complaint (see Pet. App. 10a) and denying petitioners' motion for interim attorneys fees (see *id.* at 11a). The district court previously ruled on the bulk of petitioners' claims (*Telegraph Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp.*, 564 F. Supp. 862 (N.D. Ill. 1981), *aff'd sub nom. Telegraph Sav. & Loan Ass'n v. Schilling*, 703 F.2d 1019 (7th Cir.), cert. denied, 464 U.S. 992 (1983)), including Count III, a challenge to the appointment of the receiver that the district court characterized as "the keystone of the complaint" (564 F. Supp. at 867). The petition presents the only remaining issues in the case.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1986. A petition for rehearing was denied on February 2, 1987 (Pet. App. 9a). The petition for a writ of certiorari was filed on May 4, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 22, 1980, the Illinois Commissioner of Savings and Loan Associations (respondent Schilling) took custody of petitioner Telegraph Savings & Loan Association (Telegraph) pursuant to Ill. Ann. Stat. ch. 32, § 848 (Smith-Hurd 1970) (*Telegraph Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp.*, 564 F. Supp. 862, 867 (N.D. Ill. 1981), *aff'd sub nom. Telegraph Sav. & Loan Ass'n v. Schilling*, 703 F.2d 1019 (7th Cir.), cert. denied, 464 U.S. 992 (1983) (*Telegraph I*)). The Commissioner's custody notice, referring to the statutory standard, "stated that Telegraph's withdrawal capital and permanent capital reserve were impaired; that it was unable to continue operations; and that its financial condition constituted an emergency" (564 F. Supp. at 867). The finding of an emergency allowed the Commissioner to dispense with notice to the association's directors, trustees or liquidators specifying the conditions the Commissioner criticized and stating a reasonable time within which the association could correct the problem (*ibid.*, citing Ill. Ann. Stat. ch. 32, § 848 (Smith-Hurd 1970)).

Telegraph was a state-chartered, federally-insured savings and loan association (*Telegraph I*, 564 F. Supp. at 865). In response to the Commissioner's notice taking custody of Telegraph, the Federal Home Loan Bank Board (the Bank Board) that same day determined that Telegraph was insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as the receiver for

Telegraph, pursuant to 12 U.S.C. 1464(d)(6)(A) and 1729(c) (*Telegraph I*, 564 F. Supp. at 867; Pet. App. 1a).² The appointment of a receiver for Telegraph placed Telegraph in default within the meaning of 12 U.S.C. 1724(d) and triggered FSLIC's obligation under 12 U.S.C. 1728(b) to ensure "payment of each insured account." By statute, FSLIC must meet this obligation "as soon as possible either (1) by cash or (2) by making available to each insured member a transferred account in a new insured institution in the same community or in another insured institution in an amount equal to the insured account of such insured member" (12 U.S.C. 1728(b)).

FSLIC decided to comply with this obligation by providing insured depositors with new accounts in another insured institution. Pursuant to 12 U.S.C. 1729(f)(2), FSLIC as receiver immediately entered into a "purchase and assumption" agreement with First Federal Savings & Loan Association (First Federal) under which Telegraph's business was transferred to First Federal with no break in operations. Under the purchase and assumption agreement, First Federal assumed Telegraph's liabilities (principally to its depositors) in exchange for Telegraph's "good" assets and a cash payment from FSLIC (Pet. App. 1a-2a). FSLIC as receiver retained Telegraph's loan portfolio, in order to recoup as much of the cash payment as possible (*id.* at 2a). The purchase and assumption transaction was executed on May 22, 1980, the same day the Illinois Commissioner took custody of Telegraph; on May 23, Telegraph's operations continued under First Federal's name (*Telegraph I*, 703 F.2d at 1022).

² The Bank Board is the federal agency that regulates the savings and loan industry. It operates FSLIC (see 12 U.S.C. 1725(a)), which is responsible for insuring depositor accounts at all federally-chartered and most state-chartered savings and loan associations.

When Telegraph was declared insolvent, "the market value of its liabilities exceeded that of its assets by between \$30 and \$37 million. This meant that the stockholders had been wiped out and that FSLIC, as the insurer of the principal creditors of the association (the depositors), faced a potential loss of that magnitude. By its deal with First Federal, FSLIC managed to reduce its expected loss to roughly \$12.5 million" (Pet. App. 4a).

2. Section 1464(d)(6)(A) authorizes a savings and loan association for which the Bank Board has appointed a receiver to challenge the appointment in federal district court. Petitioners filed suit under that section, attacking the validity of the appointment of the receiver and the propriety of the purchase and assumption transaction and asking the court to order the Bank Board to remove FSLIC as receiver of Telegraph. On February 19, 1982, the district court upheld the appointment of FSLIC as receiver (*Telegraph I*, 564 F. Supp. at 883), and the court of appeals affirmed (703 F.2d at 1021-1022).

Petitioners' attack on the purchase and assumption transaction was based on the claim that FSLIC, as receiver, was required to give the public 15 days' notice before it sold Telegraph's assets to First Federal (Pet. App. 3a). A Bank Board regulation, 12 C.F.R. Pt. 569a (1980), as in effect when FSLIC brought about the purchase and assumption transaction,³ required 15 days' notice before a sale of assets by a receiver of an insured savings and loan association. On December 6, 1984, the district court granted respondents' motion for summary judgment on this issue, finding that "the purchase and assumption agreement * * * was not subject to the notice requirement" (Pet.

³ Some months after the transaction at issue here, the Bank Board amended its regulations to make clear that the 15-day period does not apply to purchase and assumption transactions, see 12 C.F.R. 569a.13 (1981) (Pet. App. 4a).

App. 10a) and that the transaction was "proper in all respects" (*ibid.*).

Prior to 1982, 12 U.S.C. (Supp. V 1981) 1464(d)(8)(A) provided that in any action brought by a savings and loan association, its officers or directors under 12 U.S.C. 1464(d) the court "may allow to any such party such reasonable expenses and attorneys' fees as it deems just and proper; and such expenses and fees shall be paid by the association or from its assets."⁴ Petitioners had moved the district court for an "interim"⁵ award of attorneys fees and expenses for the period through January 31, 1982, in the amount of \$498,168.21, to be paid out of Telegraph's assets (Pet. App. 11a). On December 6, 1984, the district court rejected petitioners' request on the grounds that (i) 12 U.S.C. 1464(d)(8)(A) permitted an award of attorneys fees and expenses only to a prevailing party, and (ii) in any event no award would be appropriate in this case because the suit was "completely lacking in merit" (Pet. App. 12a-16a).

3. The court of appeals affirmed both the grant of summary judgment on the notice issue and the denial of attorneys fees and expenses. As to the notice issue, the court observed that the regulation on which petitioners relied was adopted ten years before Congress enacted 12 U.S.C. 1729(f)(2), authorizing FSLIC to engage in pur-

⁴ In 1982, after petitioners' application for fees was presented to the district court, Congress amended the statute by inserting "which prevails" after "any such party" (Pub. L. No. 97-320, § 351, 96 Stat. 1507). The Senate Report on the amendment stated that "[t]his section would clarify that a court may assess attorneys' fees against the Bank Board only in the event the agency *loses* a lawsuit" (S. Rep. 97-536, 97th Cong., 2d Sess. 59 (1982) (emphasis in original)).

⁵ Although petitioners styled their request as an interim one, the district court denied it on the same day it granted summary judgment against them on their last remaining substantive claim under Section 1464(d) (Pet. App. 10a, 16a). The court of appeals therefore treated the denial of the request as final (*id.* at 5a).

chase and assumption transactions. The court of appeals said, "not only was [the regulation] not promulgated with [purchase and assumption] transactions in mind, but, if applied to them, it would frustrate them. A purchase and assumption transaction will not work unless it is completed before the depositors know that their savings and loan association is insolvent and in receivership" (Pet. App. 3a). Accordingly, the court concluded that it was "more sensible to view the statute, 12 U.S.C. § 1729 (f)(2), as limiting the scope of a previously issued regulation than to view the previously issued regulation as preventing the board (unless and until it expressly changed the regulation) from effectuating the policy of the subsequently enacted statute" (*id.* at 4a).

The court of appeals affirmed the denial of a fee award, citing this Court's decision in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), on the ground that the statute did not permit an award to a losing plaintiff. The court noted that the statute had been amended in 1982 to provide for attorneys fees only to a party "which prevails" and said that "there is no indication that Congress thought it was changing the existing law rather than merely clarifying it" (Pet. App. 6a). The court concluded that Telegraph's theory "would encourage Telegraph to persist, as it has done, in a losing lawsuit. This is not what Congress had in mind when it enacted the fee-shifting statute. It meant to lighten the burden of meritorious litigation to the winner." *Id.* at 7a. The court found it unnecessary to reach the district court's alternative ground for refusing an award — that the suit completely lacked merit (*id.* at 5a).

ARGUMENT

The courts below correctly refused to order a fee award to losing parties and correctly determined that the purchase and assumption transaction accorded with the Bank Board's regulations. Those decisions do not conflict with

any decision of this Court or any other court of appeals. No further review is warranted.

1. Petitioners sought an interim award of attorneys fees and expenses of \$498,168.21, relying on 12 U.S.C. 1464(d)(8)(A) as it stood at the time of the application. The district court denied the award, finding that (1) the statute did not permit an award to a losing party (Pet. App. 12a-15a) and (2) if it did the court would in its discretion deny any award as not “just and proper” (*id.* at 15a-16a). The court of appeals affirmed on the statutory construction point and did not reach the district court’s alternative holding based on its discretion (*id.* at 5a).

To begin with, even if the statute permitted a fee award to a losing party, the statute says only that the court “may” award fees, and the district court’s denial plainly was not an abuse of discretion. After handling the case for more than three years, the district court concluded that “[petitioners’] lawsuit was completely lacking in merit” (Pet. App. 15a) and quoted the earlier court of appeals’ opinion sustaining the district court’s rejection of most of petitioners’ claims: “ ‘Telegraph attempts to support its position with a myriad of arguments, some of which are unsupported by legal authority’ ” (*ibid.* (quoting 703 F.2d at 1023)). The court said that the substantial time and effort needed to dispose of this case “is a comment on [petitioners’] persistence, not the merits of their claims” (Pet. App. 16a). It found that petitioners had not contributed “ ‘to the process of judicial review, or to the implementation of the Act by the agency’ ” (*ibid.* (contrasting the dissent in *Ruckelshaus v. Sierra Club*, 463 U.S. at 711)). The district court added, “a fee award in this case might well encourage other insolvent financial institutions to go to court when they have no prayer of a successful defense to governmental intervention” (Pet. App. 16a).⁶

⁶ Additional support for the district court’s discretionary decision is provided by Congress’s determination, reflected in the 1982 amend-

Moreover, the district court and the court of appeals were correct in concluding that the statute, before as well as since the 1982 amendment, did not permit an award to a losing party. This was the view of the Senate Report accompanying the 1982 legislation, which explained that the amendment "would clarify that a court may assess attorneys' fees against the Bank Board only in the event the agency *loses* a lawsuit" (S. Rep. 97-536, 97th Cong., 2d Sess. 59 (1982) (emphasis in original)). The court of appeals, properly skeptical of retroactive legislative history, nevertheless noted that it had been given "no reason not to take this language at face value" (Pet. App. 6a). The two courts' reading of the pre-1982 statute is in accord with this Court's opinion in *Ruckelshaus v. Sierra Club*, *supra*, which found that there is a heavy presumption that fee-shifting statutes permit awards only in favor of prevailing parties, a presumption "rooted * * * in intuitive notions of fairness and widely manifested in numerous different contexts" (463 U.S. at 685).

Petitioners argued below (see Pet. App. 5a-6a) that since the statute authorizes an award to be paid from the assets of the association, and since plaintiffs prevailing on a claim of the sort these plaintiffs made will recover the association and can pay themselves, the statute must have meant to authorize fees to losing plaintiffs.⁷ The court of appeals properly rejected this argument, not pressed in

ment, that the award of fees to losing plaintiffs is not in the public interest (cf. *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974)). Respondents agreed in the court of appeals that the pre-1982 law governs this litigation (Pet. App. 5a).

⁷ Such a view of Section 1464(d)(8)(A) was adopted in an unreported district court decision (*Washington Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Board*, No. C80-443 (N.D. Ohio Sept. 4, 1981)). The Bank Board prevailed on the merits in that case and did not appeal the decision awarding fees.

this Court, on the ground that there are various situations (*e.g.*, suits by officers and directors) where it makes perfect sense to speak of an award to a prevailing plaintiff out of the association's assets, and on the further ground that the argument would make the 1982 amendment wholly irrational (*id.* at 5a).

There is no evidence whatever that Congress intended in the pre-1982 version of the statute such a "truly radical departure from American and English common law and countless federal fee-shifting statutes" (*Ruckelshaus v. Sierra Club*, 463 U.S. at 685 n.7). Petitioners point to one 1966 statement by a private party that is, at best, ambiguous on the point at issue. Pet. 11-12 (quoting testimony of W.O. Duvall, past President of the United States Savings & Loan League, *Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. 186 (1966) (urging "a provision * * * which would provide for such expenses as may be approved by the court")). We are aware of no indication in the legislative history that anyone in Congress intended to provide fee awards to losing parties.

The court of appeals also correctly rejected petitioners' claim, framed in this Court as a Due Process Clause argument, that unless Section 1464(d)(8)(A) is interpreted to allow them access to money held by the receiver for the benefit of Telegraph's creditors, they would be unable to obtain a hearing on the merits of their challenge to the receivership. Petitioners have spent the last seven years vigorously litigating the merits of the Bank Board's decision, and if due process required the award of fees so that impecunious plaintiffs can bring meritless claims, the post-1982 version of the statute and many other statutes would be unconstitutional.

Finally, we note that because the statute now makes clear what was previously implicit, the interpretive issue

petitioners raise is of no continuing importance and so does not merit this Court's attention.

2. Petitioners also present their claim that the immediate execution of the purchase and assumption transaction violated a then-applicable Bank Board regulation, which required 15 days' public notice before the sale by a receiver of any of the assets of a savings and loan association (12 C.F.R. Pt. 569a (1980)). This claim is wholly without merit and, because of the subsequent amendment of the Bank Board's regulations, of no continuing importance.

The regulation requiring the 15-day notice was adopted in 1968 (see 33 Fed. Reg. 14367). At that time, the Bank Board's only means of dealing with the failure of a savings and loan association was liquidation (Pet. App. 3a; see 12 C.F.R. Pt. 569a (1978)). In 1978, however, Congress authorized the Bank Board to engage in purchase and assumption transactions (Pub. L. No. 95-630, § 105(b)(2), 92 Stat. 3647).⁸ The Bank Board interpreted its earlier regulation not to apply to a purchase and assumption transaction, and after this case began the Bank Board amended its regulations to make that clear (see 12 C.F.R. 569a.13 (1981)).

As the court of appeals explained (Pet. App. 3a), the 15-day notice requirement was to apply to a typical liquidation of an insolvent savings and loan association, in which the receiver pays off its depositors and then attempts to sell or to collect as much as it can on the assets. In a purchase and assumption transaction, FSLIC transfers to another financial institution deposit liabilities, cer-

⁸ The purchase and assumption transaction had long been employed by the Federal Deposit Insurance Corporation as a means of preserving the going concern value of insolvent banks, but it had not previously been available for dealing with thrift institutions. See Pet. App. 2a; Burgee, *Purchase and Assumption Transactions Under the Federal Deposit Insurance Act*, 14 Forum 1146 (1979).

tain assets of the insolvent association, and a cash contribution from FSLIC. The point of a purchase and assumption transaction is to “preserve[] the going-concern value of the failed institution and thus reduce[] the agency’s loss by the excess of that value over the liquidation value of the institution” (*ibid.*). See also *Gunter v. Hutcheson*, 674 F.2d 862, 865-866 (11th Cir.), cert. denied, 459 U.S. 826 (1982).

In such transactions, dispatch is essential: “a purchase and assumption must be consummated with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services” (*Gunter v. Hutcheson*, 674 F.2d at 865). Thus, the notice period “would not produce better deals; it would kill the possibility of any deal; it would nullify the purchase and assumption device that Congress has expressly authorized FSLIC to use” (Pet. App. 4a).

FSLIC’s position that the earlier version of 12 C.F.R. Pt. 569a (1981) did not apply to purchase and assumption transactions is thus eminently reasonable and more than entitled to this Court’s deference (see, *e.g.*, *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980)). And since 15 days’ notice is wholly inconsistent with a purchase and assumption transaction, petitioners’ argument would render nugatory the authority conferred by the 1978 amendments. As the court of appeals said, it is far “more sensible to view the statute * * * as limiting the scope of a previously issued regulation” (Pet. App. 4a).

Finally, the court of appeals correctly characterized petitioners’ suggestion that FSLIC enjoyed an “excess asset recovery” (see Pet. 17) as “wild” (Pet. App. 8a). Petitioners simply ignore the difference between the face value and the market value of Telegraph’s assets — which is what caused Telegraph’s failure in the first place. As the court of appeals explained (Pet. App. 4a), the purchase and assumption transaction is what enabled FSLIC to reduce its loss to roughly \$12.5 million.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JULY 1987